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NTSB Order No. EA-4002

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of October, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. DANNY KRACHUN, Respondent.	Docket SE-10975

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered at the conclusion of an evidentiary hearing on November 14, 1990.[1] The law judge affirmed the Administrator's order charging respondent with violations of sections 91.116(c) and (e), 91.119(a) and 91.9

[1]An excerpt from the hearing transcript containing the decisional order and the preceding pages detailing the basis for the law judge's decision is attached.

(now 91.175, 91.177, and 91.13, respectively) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91), and FAR section 135.225(a)(2), 14 C.F.R. Part 135,[2] but reduced the suspension period from 120 to 90 days.[3] The Administrator alleged that respondent began a final approach when the weather did not meet the minimums required under instrument flight rules (IFR), then

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[2]The Administrator alleged that:

1. where a Minimum Descent Altitude (MDA) was applicable, respondent operated an aircraft below the authorized MDA, in violation of FAR section 91.116(c);

2. when respondent elected to begin the missed approach, he failed to immediately execute the appropriate missed approach procedure, in contravention of FAR section 91.116(e); and

3. when it was not necessary for takeoff or landing, respondent operated an aircraft under IFR below the applicable minimum altitudes prescribed in Parts 95 and 97 of the FARs and, in a mountainous area, below an altitude of 2,000 feet above the highest obstacle within a horizontal distance of five statute miles from the course to be flown, in contravention of section 91.119(a).

FAR sections 91.9 and 135.225(a)(2) state as follows:

"**§ 91.9 Careless or reckless operation.**
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

"**§ 135.225 IFR: Takeoff, approach and landing minimums.**
(a) No pilot may begin an instrument approach procedure to an airport unless -

* * * *

(2) The latest weather report issued by that weather reporting facility indicates that weather conditions are at or above the authorized IFR landing minimums for that airport."

[3]The law judge decreased the sanction after he dismissed a section 61.3(c) charge. The Administrator did not appeal the dismissal or the reduction in sanction.

improperly negotiated a missed approach, culminating in a crash of the aircraft. As explained infra, we will grant the appeal only as to the section 135.225(a)(2) charge.

The Administrator's order, which served as the complaint, alleged, in pertinent part that:

> 2. On or about January 5, 1989, you acted as pilot-in-command of civil aircraft N945FE, a Cessna Model 208B, on an IFR flight for PM Air, Inc. from Denver, Colorado to Aspen, Colorado.
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> 3. Incident to that flight, you carried a non-revenue passenger.
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> 4. When you approached Aspen, Colorado on the above-described flight, you were cleared by Air Traffic Control (ATC) to execute the VOR/DME-C instrument approach procedure into the Aspen-Pitkin County Airport.
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> 5. The VOR/DME-C approach procedure specifies a minimum descent altitude of 10,840 feet MSL, and a missed approach of a climbing right turn to 14,000 feet and thence to a prescribed airway intersection.
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> 6. You executed the above-described approach, and began a missed approach.
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> 7. During your attempted missed approach, you descended to between 10,000 feet and 10,500 feet MSL.
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> 8. You then made a left turn, contrary to the missed approach procedure.
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> 9. During the course of the above-described left turn, you permitted the airplane to strike trees and to crash, causing injuries to your passenger and yourself and demolishing the airplane.
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> 10. At the time you commenced your approach into the Aspen airport, the weather at the airport was below the minimums prescribed for that instrument approach.
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> * * * *
>
> 12. Your operation of N945FE in the manner and under the circumstances described above was careless or reckless,

so as to endanger the life and property of others.[4]

Respondent first claims that the law judge erred in finding that he was in violation of §135.225 minimum IFR requirements when he commenced the initial approach into Aspen.[5] The argument is over whether a ceiling, understood as clouds or obscuration hiding more than 50 percent of the sky,[6] is a part of the §135.225 landing minimums. Respondent believes, because he had in excess of the minimum visibility specified on the approach plate, that he was entitled to begin the approach and descend to the minimum descent altitude (MDA) where, if he had the requisite visual references of the airport at a point allowing a normal descent to the runway, he could continue to land. The Administrator argues on brief that respondent did not have the requisite landing minimums, though there is no specific statement as to what the minimums required for initiation and continuation of the approach are thought to be. FAA counsel and the law judge below may have concluded that the MDA or its derivative, height above the airport (HAA), both of which are specified on the

[4]The Order of Suspension, dated March 28, 1990, was amended on October 25, 1990.

[5]In support of this argument, respondent refers to and quotes from several definitions in the Airman's Information Manual (AIM). The Administrator filed a motion to strike these references in respondent's appeal brief solely on the ground the excerpts from the AIM are not part of the record. The motion to strike is denied. We see no prejudice to the Administrator in an airman's reliance on one of the Administrator's own publications to make legal arguments concerning the applicability of FARs.

[6]See FAA Advisory Circular 61-23B, at 123.

approach plate, result in the specification of a minimum ceiling.[7] If this is the case, then the approach was commenced unlawfully, as the reported ceiling was 900 feet, while the MDA of 10,840 feet would permit the aircraft no lower than 3025 HAA, as the airport elevation is 7815 feet above sea level.

The Board does not believe that the Administrator can be affirmed on this charge. While deference to the Administrator's validly adopted interpretations of the Federal Aviation Regulations is now explicitly required by statute,[8] such deference cannot be readily accorded in the context of a hastily-developed record that is sustained solely by argument of counsel. This is particularly so where the interpretation advanced is unsupported by citation of practice, precedent, or explicit documentation, and where it entails consequences not only for

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[7] FAA counsel's opening statement included the following argument:

> [Respondent] obtained weather from the Flight Service Station, and that weather gave a ceiling in Aspen of 900 feet....The approach charts will say that the minimum ceiling for his type of approach was 3,100 feet, and that the minimum descent altitude was 10,840.

This statement is difficult to square with the approach plate (Exhibit A-4), the pertinent portion of which reads:

> CIRCLING 10840-2 3025 (3100-2)

These numbers are, respectively, the minimum descent altitude, with a 2-mile visibility requirement, the height above the airport, and the military ceiling and visibility. Numerical specifications in parentheses do not apply to civil pilots. Consequently, counsel's reference to a 3100 foot ceiling is ambiguous. To make sense of the argument at trial, we have proceeded under the assumption that the 3025 foot height above airport specification is assumed by counsel and the Administrative Law Judge to have constituted a "ceiling."

[8] See, FAA Civil Penalty Assessment Act of 1992, PL 102-345, 106 Stat. 923.

respondent, but for the aviation community generally.

To understand our reluctance to affirm this charge, particularly in light of the Administrator's burden of proof obligations, we would note that FAR 135.225(a)(2) does not itself speak to ceilings, but to landing minimums. The resultant ambiguity requires that we go beyond the regulation itself to understand its meaning. Indeed, there was apparently enough ambiguity that respondent was not initially charged with a violation of this section. The Part 135 charge was added shortly before hearing, and we cannot tell on appeal whether the requirement for an opportunity for informal conference between respondent and the FAA was satisfied.[9] In any event, the trial transcript clearly evidences the result of approaching this complicated matter without thorough forethought and an exchange of viewpoints.[10] While the administrative law judge seemingly concluded that ceilings were necessarily a part of the landing minimums specified by the approach plate, it is less than clear where he thought that ceiling was to be found.

While the existence of a low ceiling -- a weather-related phenomenon -- has practical implications for instrument approaches, the establishment of MDA's is made necessary to account for all navigational problems that an aircraft may encounter on an instrument approach. These include, but are

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[9] See Oceanair of Florida v. NTSB, 888 F.2d 767 (1989).

[10] The transcript, pp. 227-29, indicates that counsel for both sides were far less than certain about the landing requirements for Part 135 carriers.

definitely not limited to, low ceilings. Hence, the terms MDA and HAA have meanings that are independent of the weather-related term "ceiling."[11] Further, ceilings will be called whenever more than half the sky is obscured. Thus, concluding that a Part 135 aircraft is not permitted to commence an approach when the ceiling is lower than the MDA will have obvious operational consequences. It may be that these consequences are warranted, and indeed it may also be that FAA-approved operating manuals of Part 135 carriers specify how particular approaches are to be flown. But we cannot find on this record that the Administrator has carried the requisite burden necessary for a violation here, and we do not find that the conclusions of the administrative law judge are self-evidently sustainable. If it is intended that Part 135.225(a)(2) be read to specify that MDA's or HAA's are minimum ceilings, FAA has a variety of procedures available to it which would better serve to inform the aviation community of the Administrator's interpretation.

Respondent's remaining contentions distill to the proposition that he properly exercised his authority as pilot-in-command in reacting to an emergency situation, and that he

[11]We would note that Part 97 (14 CFR 97), Standard Instrument Approach Procedures, defines the term "ceiling minimum" as the minimum ceiling expressed in feet above the surface of the airport required for **takeoff** or required for designating an airport as an alternate. (14 CFR 97.3(e)) The absence of any reference to **landings**, while not dispositive of the issue, is at least consistent with the proposition that the term "landing minimums" in Part 135 does not necessarily include a ceiling minimum. Cf., 14 CFR 97.3(x), "*visibility minimum* means the minimum visibility specified for approach, **or landing**, or takeoff...."

should not and cannot be penalized for such.[12] The administrative law judge weighed the evidence on this contention carefully, and we see nothing in respondent's argument on appeal which would lead us to disturb the determinations below.

Respondent testified that, when he reached MDA without airport visibility, he attempted to execute a missed approach. According to respondent, the aircraft kept descending, even as he gave it full power. He believes that turbulence or icing affected the aircraft performance and he struggled to arrest the descent rate and keep the aircraft straight and level. By the time he believed he had regained enough lift and control to initiate a turn, he thought himself past a point where he could safely turn right, as the missed approach procedure required, so he turned left into what he believed to be lower terrain. Transcript (Tr.) at 186-89. Shortly thereafter, the aircraft crashed.

Despite respondent's explanation, the law judge gave more credence to the testimony of other witnesses, such as the passenger/observer flying with respondent.[13] The passenger stated that during the approach, the aircraft flew through "solid clouding" and snow. Tr. at 122. He related that they experienced only light turbulence during descent, and opined that

[12]While it is clear under FAR section 91.3(b) that a pilot-in-command may deviate from the FARs in an emergency, that emergency must have been unforeseen and unavoidable by the exercise of sound judgment. See Administrator v. Hollis, 2 NTSB 43, 45-46 (1973).

[13]The passenger was also a commercial pilot.

the aircraft's subsequent oscillations were caused by the over-controlling of the aircraft. Tr. at 159-60. His testimony would offer credible evidence that the go around was not fully initiated until well past the missed approach point, and that respondent was unprepared for the missed approach procedure.[14] Another witness, a pilot for Rocky Mountain Air who landed at Aspen Airport approximately 10 to 15 minutes before respondent began his approach, testified that he experienced nothing more than light turbulence that morning in the vicinity of Aspen Airport. Tr. at 97.

Upon evaluation of the testimony and evidence, the law judge determined that respondent's predicament was of his own making. He found that respondent was not justified in executing a missed approach in a manner contrary to the directives of the current approach plate. It was well within the law judge's discretion to consider the testimony of the passenger and the Rocky Mountain Air pilot as more credible than that of respondent. Absent a showing that the law judge's conclusions are inherently incredible, they will not be disturbed. See Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988); Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992).

[14]The evidence indicated, and the law judge found, that respondent did not have the current approach plate on board the aircraft. The current plate differed from the one on board as to pertinent details for the execution of a missed approach. While the complaint did not explicitly charge this fact as a specific regulatory violation, the law judge was entitled to use this fact in his appraisal of the charge that the flight was operated carelessly.

Given the law judge's factual findings, respondent may not avail himself of the exculpatory effects of section 91.3(b). Further, based on the law judge's conclusions, there is adequate support for the determination that respondent acted carelessly, in violation of FAR section 91.9. Respondent's careless actions were inherently dangerous and not only created the potential to endanger life and property, but actually endangered life and destroyed property. See Haines v. Dep't of Transp., 449 F.2d 1073 (D.C. 1971)(potential endangerment is enough to find a violation of section 91.9).

Regarding sanction, because we reversed the law judge's affirmance of the section 135 charge, we must review the suspension period he imposed. The law judge reduced the sanction from a 120 to a 90-day suspension after dismissing the section 61.3(c) charge. Because we believe that the reversal of the section 135.225 charge does not significantly lessen the overall seriousness of the respondent's careless, if not reckless, approach to Aspen, we think that an 80-day suspension is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted, in part;

2. The initial decision is modified as discussed herein; and

3. The 80-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[15]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[15]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).